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LOS ANGELES

CONKLING, Alfred, jurist, b. in Amagansett, Suffolk co., N. Y., 12 Oct., 1789; d. in Utica, N. Y., 5 Feb., 1874. He was graduated at Union in 1810, studied law, and was admitted to the bar in 1812. He was district attorney for Montgomery county three years, and was elected to congress as an anti-Jackson democrat, serving from 1821 till 1823. He then removed to Albany, and in 1825 was appointed by President John Quincy Adams judge of the U. S. district court for the northern district of New York, which office he held till 1852, when President Fillmore appointed him minister to Mexico. On his return from that mission, in 1853, he settled at Genesee, N. Y., devoting himself mainly to literary pursuits. Union college gave him the degree of LL. D. in 1847. He published "Treatise on the Organization and Jurisdiction of the Supreme, Circuit, and District Courts of the United States" (2d ed., 1842); "Admiralty Jurisdiction" (2 vols., 1848); "The Powers of the Executive Department of the United States" (Albany, 1866); and the "Young Citizen's Manual."—His son, **Frederick Augustus,** b. in Canajoharie, N. Y., 22 Aug., 1816, received a classical education, and became a merchant. He was for three years a member of the New York legislature. In June, 1861, he organized, at his own expense, the 84th New York regiment, serving as its colonel. During July, 1863, the regiment did duty as provost-guard at Baltimore, Md., and in 1864 it saw several months' service in Virginia. Col. Conkling served one term in congress, from 1861 till 1863, and in 1868 was the Republican candidate for mayor of New York. He changed his politics, however, and spoke in various parts of the Union in favor of Mr. Tilden's election to the presidency in 1876, and of Gen. Hancock's in 1880. He is a trustee of the College of physicians and surgeons, a member of the geographical and historical societies, and the author of various reports to the New York legislature, and numerous pamphlets on political, commercial, and scientific subjects.—Another son, **Roscoe,** senator, b. in Albany, N. Y., 30 Oct., 1829, received an academic education, and studied law three years under his father's tuition. In 1846 he entered the law-office of Francis Kernan, afterward his colleague in the senate, and in 1850 became district attorney for Oneida county. He was admitted to the bar in that year, and soon became prominent both in law and in politics. He was elected mayor of Utica in 1858, and at the expiration of his first term a tie vote between the two candidates for the office caused him to hold over for another term. In November, 1858, he was chosen as a Republican to congress, and took his seat in that body at the

beginning of its first session, in December, 1859—a session noted for its long and bitter contest over the speakership. He was re-elected in 1860, but in 1862 was defeated by Francis Kernan, over whom, however, he was elected in 1864. His first committee was that on the District of Columbia, of which he was afterward chairman. He was also a member of the committee of ways and means and of the special reconstruction committee of fifteen. Mr. Conkling's first important speech was in support of the fourteenth amendment to the constitution. He vigorously attacked the generalship of McClellan, opposed Spaulding's legal-tender act, and firmly upheld the government in the prosecution of the war. Mr. Conkling was re-elected in the autumn of 1866, but in January, 1867, before he took his seat, was chosen U. S. senator to succeed Ira Harris, and re-elected in 1873 and 1879. In the senate he was from the first a member of the judiciary committee, and connected with nearly all the leading committees, holding the chairs of those on commerce and revision of the laws. Senator Conkling was a zealous supporter of President Grant's administration and largely directed its general policy toward the south, advocating it in public and by his personal influence. He was also instrumental in the passage of the civil-rights bill, and favored the resumption of specie payments. He took a prominent part in framing the electoral-commission bill in 1877, and supported it by an able speech, arguing that the question of the commission's jurisdiction should be left to that body itself. Mr. Conkling received 93 votes for the Republican nomination for president in the Cincinnati convention of 1876. In the Chicago convention of 1880 he advocated the nomination of Gen. Grant for a third term. In 1881 he became hostile to President Garfield's administration on a question of patronage, claiming, with his colleague, Thomas C. Platt, the right to control federal appointments in his state. The president having appointed a political opponent of Mr. Conkling's to the collectorship of the port of New York, the latter opposed his confirmation, claiming that he should have been consulted in the matter, and that the nomination was a violation of the pledges given to him by the president. Mr. Garfield, as soon as Mr. Conkling had declared his opposition, withdrew all other nominations to New York offices, leaving the objectionable one to be acted on by itself. Finding that he could not prevent the confirmation, Mr. Conkling, on 16 May, resigned his senatorship, as did also his colleague, and returned home to seek a vindication in the form of a re-election. In this, however, after an exciting canvass, they failed; two other republicans were chosen to fill the vacant places, and Mr. Conkling returned to his law practice in New York city. In 1885–'6 he was counsel of the State senate investigating committee, appointed for the purpose of disclosing the fraud and bribery in the grant of the Broadway horse-railroad franchise by the board of aldermen in 1884. After the taking of testimony, lasting about three months, Mr. Conkling, together with Clarence A. Seward, made an argument which resulted in the repeal of the Broadway railroad

charter.—Alfred's daughter, **Margaret Cockburn** (Mrs. Steele), b. 27 Jan., 1814, has published "Memoirs of the Mother and Wife of Washington" (Auburn, N. Y., 1851–'3); "Isabel; or, Trials of the Heart"; a translation of Florian's "History of the Moors of Spain," and has contributed to current literature.—Alfred Conkling's grandson, **Alfred Ronald**, b. in New York city, 28 Sept., 1850, was graduated at Yale in 1870, pursued his studies at Harvard and in Berlin, Germany, and on his return to this country was employed on the U. S. geological survey. He then studied law, was admitted to the bar in 1879, and became assistant U. S. attorney in 1881–'2. He was an unsuccessful Republican candidate for congress in 1884, and made many addresses in favor of the election of James G. Blaine during the presidential campaign of that year. He is the author of "Appletons' Guide to Mexico" (New York, 1884).

THE POWERS

OF

THE EXECUTIVE DEPARTMENT

OF THE

GOVERNMENT OF THE UNITED STATES.

By ALFRED CONKLING.

"Better to be awakened by the alarm-bell than to perish in the flames."—*Burke.*

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EXECUTIVE POWER.

THE unparalleled struggle, for the maintenance of the Union, from which we have so lately emerged, is rightly regarded as one of those great historic events which shape the destinies of nations. Some of its fruits are already palpable to the grossest sense. It has freed us from the curse and opprobrium of legalized human bondage; it has demonstrated our capacity for successful warfare, upon a grand scale, on land and sea; and in proving to us, as it has incontestably done, that we have nothing to expect from the good-will, little from the honesty, and still less from the magnanimity of two, at least, of the most

powerful nations of the old world; it has also taught both them and us that, so long as we are true to ourselves, we have little to fear from their enmity. It has aroused into unwonted activity all the intellectual, moral, and impulsive energies of the American mind; and if it has brought out, in bold and revolting relief, all that is most odious and humiliating in man, it has expanded and invigorated all that inspires him with noble thoughts and high aspirations, and all else that exalts him to a rank in the scale of being, "but a little lower than the angels;" and whatever else may befall us, we may confidently hope that the grand impulse it has thus imparted to our career of intellectual and moral civilization, is destined to endure. Let this great boon be our consolation for the terrible sacrifices it has cost us. But it is not upon these topics that I design to dwell, and I address

myself at once to the task I have undertaken.

One of the consequences of the Rebellion has been to awaken public attention more strongly than it had yet been, to a great problem of constitutional law; a problem of transcendent importance, and demanding the earnest and dispassionate consideration of the American people. It was discussed in the constitutional convention; by the cotemporaneous public press; by the writers of the "Federalist," two of whom were among the most distinguished members of the convention, after it had been submitted to the people for ratification; and in the conventions of the several States; and it has, to a greater or less extent, incidentally provoked discussion under nearly every administration of the national government, from that of Washington inclusive, down to the present day.

It has also been briefly treated by our writers on constitutional jurisprudence; and, with regard to some of its elements, subjected also to judicial scrutiny. And yet, now, under all the lights thus shed upon it, after the lapse of three-quarters of a century, it not only remains practically unsolved, but presents itself under new and alarming phases. I hardly need to say that I refer to the SCOPE of EXECUTIVE POWER in our national system of government, and, incidentally, to the line which separates it from the legislative power. The subject already occupies no inconsiderable share of the public attention, and has awakened, in no slight degree, the solicitude of thoughtful men. It would have been strange, and, to the enlightened patriot, disheartening, had it been otherwise. Unfortunately, it has now become complicated with party politics, and consequently obscured in the

popular mind, by the blind passions of party zeal. A hasty glance over the recent past will suffice to show how all this has happened, and is essential to my design. The sudden surrender of the rebel armies placed the country in a predicament demanding, on the part of the government, the utmost circumspection, the most upright intentions, and the most consummate skill. The simultaneous assassination of the President added to the perplexity inseparable from the emergency. That, in anticipation of its occurrence, President LINCOLN had profoundly meditated its exigencies, is not to be doubted. During four eventful and harassing years, in the loyal as well as in the rebellious States, and in both houses of Congress, he had constantly been the object of wanton obloquy and insulting vituperation; but he was too profoundly sensible of the momentous

responsibilities of his office, to allow his equanimity to be disturbed by these aspersions; and calmly pursuing the even tenor of his way, in the conscientious and faithful discharge of his duty, he suffered them to pass by him as the idle wind. Conscious of his own rectitude, and not wanting in a just confidence in his own judgment, he was no egotist, and did not imagine that he was wiser than all other men. He had read the Constitution too carefully, and understood it too well, not to see that the august political fabric, shaken to its foundation, and which he had sworn, to the best of his ability, to preserve, protect and defend, could be constitutionally restored and renovated only by the joint agency of the legislature prescribing the means, and of the executive faithfully carrying them into effect; and neither flattery, nor

evil counsel, nor ambition could have seduced him to attempt the herculean task of reconstruction alone, by the assumption of powers that did not belong to him. Had he lived, therefore, but a few weeks longer, it may safely be presumed that he would have gladly availed himself, as he had done at the outbreak of the rebellion, of his constitutional right to convene the legislative council of the nation, to deliberate and decide upon the momentous questions to be determined. His untimely death was inevitably followed by the instantaneous substitution of a successor, in nearly every element of character his opposite. Whether, and to what extent, his foul assassination — a deed destined, by its atrocity, to eternal infamy and execration — is attributable to a deliberately formed hope that the change would be a boon to the already prostrate foes of the Union, or

is to be ascribed to the uncalculating impulses of hatred and rage, must as yet be left to conjecture. But one of its fruits has been to force upon the anxious attention of all those who justly estimate the value of our political institutions, and feel the importance of preserving them as they were framed and handed down to us by the fathers of the Republic, the interesting problem I have mentioned. How it has happened to be drawn into the vortex of party warfare remains to be briefly narrated.

When the framers of the Constitution, and the American people in adopting it, deemed it wise, for greater safety, to invest the president with power, "on extraordinary occasions," to convene Congress, the wildest imagination could not have prefigured an occasion more extraordinary than that of the condition of the country at the accession of Mr. JOHNSON. But, for

reasons which I abstain from any attempt to unfold, he saw fit, like a daring mariner, sailing forth, without chart or compass, upon an unknown sea, to assume the high and perilous responsibility of dealing with it alone! The country, wearied with the war and rejoiced at its termination; already grown familiar, during its continuance, with the unavoidable exercise by the executive of unusual powers; sensible of the novelty and perplexity of its situation; and half confounded by the audacity of the undertaking, looked on in apprehensive silence. Some alarm was created, at the outset, by the frequency and vehemence of the president's threats of punishment against the now prostrate rebels; but all fears on this score soon gave way to others still more alarming, awakened by the sudden and almost boundless display of clemency on his part, and by the new-born

and growing favor and confidence with which he began to be universally regarded throughout the South, and by its friends and advocates elsewhere. What has since come to be familiarly called "The President's Policy," was soon developed. Throughout the loyal States there was an earnest and universal desire to see the insurgent States restored to their original place in the glorious Union they had, through four years of bloody strife, done their utmost to destroy, as soon as it could be done with safety. This was due to the deluded millions of the South, and especially to those who, at the peril of life, had remained loyal to the Union; it was for this that the war had been prosecuted at a cost which baffles calculation, and tasks imagination. How, with a just regard to the impressive lessons of the past, this could be accomplished, was the great prob-

lem to be solved. A more perplexing, a more pregnant, a more momentous question never taxed the ingenuity of man. It was not a question to be decided by men who were impatient for the restoration of the seceded states, as a means, by their coöperation, of regaining political ascendency, regardless of all other consequences; nor by men who had devoted their worthless lives to partisan warfare, however notorious they might have become for their skill in devices to carry an election; nor by a man of undisciplined and ill-balanced mind, constantly liable to be swayed by passions strong by nature, and rendered stronger by habitual indulgence, however intelligent and patriotic. Involving the peace, prosperity and happiness of countless millions of our race on this continent, to say nothing of the influence of our example in other countries, it demanded

the deliberate exercise of all the intellectual and moral faculties of the human mind, enlightened by culture and reflection. To the mind of the president the subject naturally presented itself under an aspect far less imposing. Animated by the prevailing desire for reconstruction; favored by the long recess of Congress; coveting, perhaps, the glory of the achievement, and possibly not insensible to the allurements of a less elevated ambition, he resolved, like ALEXANDER, to cut the Gordian knot, and overlooking or disregarding the lurking dangers of the enterprise, to advance at once, by the shortest and easiest road, to its accomplishment. He accordingly proceeded without delay to issue an order, bearing date the 29th of April, for the restoration of commercial intercourse with the people of the insurrectionary States; and also, under the same

date, a proclamation of amnesty and pardon to all who had participated in the rebellion, with the exception of certain classes of persons, who, it was provided, might nevertheless make special application for pardon.

But the most significant and important of the series of acts following each other, in rapid succession, from the executive department, were the measures resorted to for the reëstablishment of State governments in subordination to the Constitution, in place of the pseudo State organizations under the Constitution of the Confederate States. Assuming that this could not be done without the aid and sanction of the *national government*, the president seems to have had as little doubt of *his* authority to do whatever the exigency of the case required. He commenced the work by an order dated May 9th, "to reëstablish the authority of

the United States, and execute the laws within the geographical limits known as the State of Virginia." This order declares void all acts of the insurrectionary government within the designated limits, and cautions all persons against acknowledging its authority, under pain of being held to be in rebellion against the United States; and after various directions to the heads of the exective departments, and to the judge of the district court, for the purpose of putting into execution the laws of the United States, it concludes as follows: "that to carry into effect the guaranty of the Federal Constitution of a republican form of State government, and afford the advantage and security of domestic laws, as well as to complete the reëstablishment of the authority of the laws of the United States, and the full and complete restoration of peace within the limits aforesaid, FRANCIS H. PIERPONT, Governor

of the State of Virginia, will be aided by the Federal Government so far as may be necessary in the lawful measures he may take for the extension and administration of the State government throughout the geographical limits of said State." It will be seen that, in relation to Virginia, the President availed himself of a State organization already in existence. It was the work of a convention composed of loyalists that assembled at Alexandria the year before, April, 1864. Its history, into which, however, it is unnecessary to enter, would show it to be entitled to little confidence; but it served, nevertheless, as a pretext under presidential patronage for the election of representatives and senators in the thirty-ninth Congress, and thus unequivocally to develop "the President's Policy."

In most of the other insurgent States no such organizations existed, and the presi-

dent lost no time in supplying the deficiency. And, for this purpose, he resorted to the expedient of appointing in each of them an officer under the title of *Provisional Governor*, charged with the duty of immediately calling a convention composed of delegates to be chosen by the loyal inhabitants, for the purpose of altering or amending the Constitution of the States. These appointments were made by a series of successive proclamations following each other at short intervals, and are understood to have been, *mutatis mutandis*, in the same words. The first of the series was that relating to North Carolina, bearing date the 29th of May, 1865, which, it will be remembered, is also the date of the proclamation of amnesty and pardon. It commences with a preamble setting forth the views of executive authority and duty entertained by the President, and by which he professed to

be governed in resorting to the step he was taking. The preamble and part of the first paragraph of the proclamation are in the following words:

"WHEREAS, The fourth section of the fourth article of the Constitution of the United States declares that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion and domestic violence; and whereas the President of the United States is, by the Constitution, made Commander-in-Chief of the army and navy, as well as chief civil executive officer of the United States, and is bound by solemn oath faithfully to execute the office of President of the United States, and *to take care that the laws be faithfully executed*;[1] and whereas the rebellion which has been waged by a portion of the people of the United States against the properly constituted authorities of the government thereof, in the most violent and revolting

[1] The words in italics are not in the oath. They are used elsewhere in the Constitution to designate one of the duties it enjoins upon the President. The italics here, and in all subsequent quotations from the president, are my own.

form, but whose organized and armed forces have now been almost entirely overcome, has, in its revolutionary progress, deprived the people of the State of North Carolina of all civil government; and whereas it becomes necessary and proper to carry out and enforce the obligations of the United States to the people of North Carolina, in securing them in the enjoyment of a republican form of government:

"Now, therefore, in obedience to the high and solemn duties imposed upon *me* by the Constitution of the United States, and for the purpose of enabling the loyal people of said State to organize a State government, whereby justice may be established, domestic tranquillity insured, and loyal citizens protected in all their rights of life, liberty and property, I, ANDREW JOHNSON, President of the United States, and Commander-in-Chief of the army and navy of the United States, do hereby appoint WILLIAM W. HOLDEN Provisional Governor of the State of North Carolina, whose duty it shall be, at the earliest practicable period, to prescribe such rules and regulations as may be necessary and proper for convening a convention, composed of delegates to be chosen by that portion of the people of said State who

are loyal to the United States, and no others, for the purpose of altering or amending the Constitution thereof; and with authority to exercise, within the limits of said State, all the powers necessary and proper to enable such loyal people of the State of North Carolina to restore said State to its constitutional relations to the Federal Government, and to present such a republican form of State government as will entitle the State to the guarantee of the United States therefor, and its people to protection by the United States against invasion, insurrection and domestic violence: *Provided*," &c., designating the qualifications of voters, and of the delegates to be chosen to form a convention. Then follows a direction to "the military commander of the department, and all officers and persons in the military and naval service," to "aid and assist the said Provisional Governor in carrying into effect this proclamation."

Like proclamations were issued for the States of Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida. Tennessee, Arkansas and Louisiana were omit-

ted; political organizations spontaneously instituted, deemed by the President sufficient for his purpose, already existing in these States. In pursuance of the duty enjoined upon the Provisional Governors, conventions were held and Constitutions framed, which, however, *were in no one of the States submitted for approval to the people.* In *North Carolina* the convention assumed legislative functions, and among other acts divided the State into congressional districts and provided for the election of members of Congress, which resulted in the choice of persons who had acted a conspicuous part in the civil or military service of the conspirators against the republic. Two persons of the like stamp were also appointed senators. A like result followed in the other States.

The *Georgia* convention was found to be composed exclusively of unpardoned rebels.

but the untoward emergency was promptly met by an executive telegram to "send hither the list of members elected to the convention, in order that pardons may be issued."

These conventions, availing themselves of the predicament in which the President had so adventurously placed, and from which they saw how difficult it must be to extricate, himself, did not scruple to disregard and thwart his known wishes and requests. He had urged not only the repeal, but the utter repudiation, *ab initio*, of the ordinances of secession, and the formal repudiation of the debts incurred in prosecuting the rebellion. The *South Carolina* convention refused to comply with either of these demands. The *North Carolina* convention demanded the abrogation of the oath prescribed by the proclamation of amnesty and pardon. The Mississippi

convention took it upon themselves to reject the pending amendment to the Constitution proposed to the States at the last preceding session of congress, to complete and perfect the great work of emancipation, commenced by the memorable military proclamation of the murdered President, by the final abolition of human bondage throughout the Union. In all of the conventions, except that of North Carolina, for the ill-concealed purpose of securing a pretext for a claim upon the nation to compensate them for their emancipated slaves, slavery was declared to have been "*destroyed by military power.*" Had the President been far less self-confident and sanguine, he must have seen in these discouraging and grotesque results the signal failure of his scheme; and had he been an impartial observer of their concomitant incidents, he could not have

failed to see that it had proved *worse* than a failure.

The final extinction of the rebellion, and the terrible calamities it had brought upon its votaries, had served to repress the arrogant and presumptuous spirit in which it had its origin, and had found its main aliment, and to inspire a hope in the minds of all humane and patriotic men in the loyal States of a sincere, if not cheerful, acquiescence on the part of the late insurgents, in such reasonable terms of restoration as the outraged nation, through its proper representatives, might see fit to require. But emboldened by the encouragement held out by the "President's Policy," and its eager and ostentatious approval by their numerous partisans in the loyal States, they soon began to display a spirit of insubordination and hostility to the Union, which, unhappily, seem

ever since to have been on the increase, and which, extending to the lowest grades of humanity, has naturally led to the perpetration of many revolting atrocities.

After a constrained recess of nine months, but before these incidental consequences of the presidential policy were fully developed, and while the country was still but imperfectly informed concerning its details, congress assembled in obedience to the Constitution.

As the president, to the amazement of the whole civilized world, yielding himself up to the dominion of passion, has seen fit, in a long series of violent and most unseemly public harangues, commencing with that addressed to a mob assembled in front of the presidential mansion, on the birthday of Washington, to denounce this Congress as usurpers and public enemies, to deny their authority and

encourage disobedience to their enactments, it may not be amiss to pause here a moment, for the purpose of exhibiting this unprecedented conduct of the chief magistrate of the nation in its true light. It was against the large republican majorities of the two houses that his denunciations were exclusively hurled. These gentlemen were elected by the votes of the same great patriotic party to which Mr. JOHNSON owed his own elevation. There had been no manifestation of want of confidence or dissatisfaction on its part toward its chosen representatives, while there were abundant indications to the contrary. The vituperations heaped upon their heads fell, therefore, also upon the heads of those citizens by whose votes both they and the president himself had been clothed with power. No congress, composed of

men more distinguished for ability, probity, and noble and generous sentiments, and patriotic devotion to the present and future welfare of the country, had ever assembled within the walls of the capitol. That it comprised many men who, in all the attributes of character that confer a title to public confidence and respect, were Mr. JOHNSON'S superiors, no intelligent and candid man will deny. Such were the men whom he has not scrupled thus publicly and wantonly to arraign, insult and vilify.

Reverting now, from this brief digression, to the meeting of Congress, I may safely assume that the republican members, during the long recess, profoundly sensible of the weighty responsibility which must eventually rest upon their shoulders, were watching the proceedings of the President with lively interest and anxious concern.

It was impossible to approve, but they were inclined to be hopeful, and were extremely averse to any controversy with him, and they were determined, if possible, to win him over to coöperation with themselves, in a safer and wiser policy. But, on the other hand, they were alive to the importance of the trust reposed in them, and cherished no thought of shirking the perplexing duties it imposed. Supinely to fold their arms and leave the president to work on, without scrutiny or show of supervision, would have been not only to sleep upon their post in the hour of danger, but to abdicate their place in the government, and to convert it into an autocracy. Such was the temper in which congress assembled. It was the duty of the president, enjoined by the Constitution, to inform them of the condition of the country, and to recommend to their

consideration such measures as he deemed necessary and expedient. His annual message was accordingly listened to with lively interest. Touching the great problem of reconstruction, he informed congress that, upon his accession to the presidency, the rebellion having already been effectually suppressed in all the States where it had raged, the first question that presented itself for decision was, whether the territory within the limits of those States "should be held as conquered territory, *under authority emanating from the President as the head of the army;*" and after assigning the reasons which constrained him to reject that alternative, he had, "gradually and quietly, and by almost imperceptible steps, sought to restore the rightful energy of the general government and of the States." "To that end," he adds, "Provisional Governors have been appointed for the States,

conventions called, governors elected, legislatures assembled, and senators and representatives chosen to the Congress of the United States. At the same time the courts of the United States, as far as could be done, have been reöpened, so that the laws of the United States may be enforced through their agency." * * * * * "I know very well," he observes, "that this policy is attended with some risk; that for its success it requires at least the acquiescence of the States which it concerns; that it implies an invitation to these States, by renewing their allegiance to the United States, to resume their functions as States in the Union. But it is a risk that *must* be taken; in the choice of difficulties it is the smallest risk; and to diminish, and, if possible, to remove all danger, I have felt it incumbent on me to assert one other power of the general government—

the power of pardon." He further informed Congress, that "in order to restore the constitutional relations of States, he had invited them to participate in the high office of amending the Constitution, by ratifying the amendment to abolish slavery;" and he adds, that "it is not too much to ask of the States which are now resuming their places in the family of the Union, to give this pledge of perpetual loyalty and peace." Then follows this passage:

"The amendment to the Constitution being adopted, *it would remain for the States* whose powers have long been in abeyance, to *resume* their places in the two branches of the national legislature, and thereby complete the work of restoration." And then, with what may appear to the reader a lofty consciousness of courtly condescension, he adds: "Here it is for *you*, fellow-

citizens of the Senate, and for *you*, fellow-citizens of the House of Representatives, to judge, *each for yourselves*, of the elections, returns, and qualifications of your own members." The power, thus conceded to the two houses, the reader will observe, is, in the same terms, expressly conferred upon them by the Constitution. This reference to it was doubtless designed to smooth the way to the speedy admission of the worthy persons who, as we have seen, had been chosen to represent the people of the States which, in the language of the message, were then "resuming their place in the family of the Union;" and, with the exception of the removal of a formal impediment to the holding of a circuit court in Virginia, in order, among other things, that "the truth" might be "clearly established and affirmed that treason is a crime," and "that traitors should be punished and the

offense made infamous," this is the *only* legislative power which, in this unprecedented and most momentous emergency, the president saw fit to invoke! And even this power, when it came to be exercised by congress, he insisted, ought to be confined to limits so narrow as to render it virtually nugatory, for he denied that it afforded any warrant for inquiry into the political condition of the insurgent States, for the purpose of ascertaining whether they were entitled to be represented in Congress, or even whether the elections that had taken place in them were valid.

It soon became evident that a great majority of the two houses were irreconcilably averse to the President's scheme. Their objections to it were numerous and insurmountable. They believed that in concocting and adopting it, he had assumed to play a part that did not pertain to

his office, that his intermeddling had been without authority, and that the anomalous proceedings he had set on foot in the States were not binding on their inhabitants; that even if they were at liberty to overlook these grave objections, it would be premature, and to the last degree hazardous and unwise, at once to admit the persons who had been chosen in the States so lately in open insurrection against the government, to seats in congress; that to allow these States to resume their original place in the Union, without additional safeguards against intolerable evils likely otherwise to ensue, would be heedlessly and unnecessarily to jeopard all that had been gained by the suppression of the rebellion; to invite new disasters; and, in short, wantonly and wickedly to sport with the destinies of the nation. Congress accordingly determined to institute an original and search-

ing investigation comprising all the elements of the new and perplexing problem, which it was their unavoidable duty to grapple with and to solve. A joint committee was therefore appointed "to inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either house of congress." With unsurpassed industry and impartiality this committee collected a vast mass of information drawn from numberless witnesses, among whom were several who had played a very conspicuous part among the chief actors in the late rebellion.

"The policy of congress" was gradually matured and developed. A bill was passed by the two houses extending, and otherwise modifying, the act passed at the last preceding session for the relief of freed-

men and refugees. It was returned by the president on the 19th of February, without his approval, accompanied by a message, in which he availed himself of the opportunity to maintain and fortify his scheme of reconstruction, and in which, referring to the termination of the civil war, he peremptorily denied the right of congress "to shut out, in time of peace, any State from the representation to which it is entitled by the constitution." The bill was again passed by the House of Representatives, notwithstanding the President's objections, by the votes of more than three-fourths of the members present; but failing to receive the requisite vote in the Senate, it failed to become a law. Another bill was passd, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication." This bill met

with a like reception at the hands of the president, but became a law by the votes of two-thirds of the members of each house, notwithstanding his objections. The joint committee at length made an elaborate and very able report, in which, without impugning the president's motives, they pointedly condemned his proceedings as unwise, and as unwarranted by the constitution or the laws of the Union. The report was accompanied by a proposed amendment to the constitution, which, after an exhausting discussion in both houses, was adopted, and submitted to the States for ratification. It embodies the mildest terms and conditions on which, in the opinion of congress, it was either just or safe to reïnvest the seceding States with their lost rights and privileges, as constituent members of the Union. It declares, in substance, that the dusky millions

who had been our allies in the war, who had by our act been liberated from bondage, and to whom the faith of the nation stood pledged for the full enjoyment of their freedom, had a just claim to the formal and authoritative acknowledgment of their citizenship, and to security against hostile and oppressive State legislation; that in those States in which their right to vote, in common with men of the white races, should be withheld from them, they shall not be counted in the apportionment of representatives in congress: that no person who, as a member of congress, or of a State legislature, or as an officer of the United States, or as an executive or judicial officer of a State, after having taken the oath to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, shall be a senator, or representative in congress,

or elector of President and Vice-President, or hold any office, civil or military, under the United States, or any State: that the validity of the public debt of the United States shall not be questioned: that neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of slaves; but that all such debts and obligations shall be held illegal and void: and lastly, that congress shall have power to enforce these provisions by appropriate legislation.

Three of the members of the committee withheld their assent from the report, and made a report declaring their approbation of the President's proceedings, and citing two judicial decisions: one by the district judge of Massachusetts, and the other by one of the justices of the supreme court,

in support of them. The first of these decisions appears to me entirely sound, with the exception of one of its propositions, which seems, at least, to require qualification. The observation to which I refer is this: "When the United States take possession of a rebel district, they merely vindicate their preëxisting title. Under despotic governments, confiscation may be unlimited, but under our government the right of sovereignty over any portion of a State is given and limited by the Constitution, and *will be the same after the war as it was before*." It is to this last clause that I take exception. That the right of sovereignty will eventually, upon final adjustment, become the same as it was before, is indisputable; and this, I suspect, is all that this learned and able judge designed to be understood to say: but if the proposition is to be considered as implying a denial to the

government of the right to prescribe terms, as conditions precedent to its recognition of this change — this return to the status *ante bellum* — I cannot assent to it. The other opinion, which seems to the dissentients "evidently carefully prepared," though sadly wanting in perspicuity, appears, however, to be explicit upon this point, and upon some others also, concerning which the majority of the committee arrived at opposite conclusions.

Referring to "the provisional government" that had been "appointed" by the President in South Carolina, his honor is represented to have said: "In operation [virtue?] of this appointment, a new Constitution had been formed, a governor and legislature elected under it, and *the State placed in the full enjoyment, or entitled to the full enjoyment, of all her constitutional rights and privileges.* The constitutional laws of

the Union were thereby enjoyed and obeyed, and were as authoritative and binding over the people of the State as in any other portion of the country. Indeed, *the moment the rebellion was suppressed*, and the government growing out of it subverted, *the ancient laws resumed their accustomed sway, subject only to the new reorganization by the appointment of the proper officer to give them operation and effect!*"

Considering that the "ancient" constitution of South Carolina, and all its laws having any reference to the ancient Union, had been consigned to the flames, and that the provisional government was not instituted until many months after the rebellion was suppressed, the "operation" ascribed to it by his Honor, in this phenix-like resurrection, must, to ordinary minds, seem magical; but hardly more so than the authority he ascribes to the President, in

another part of his opinion, as Commander-in-Chief of the army and navy in time of peace.

The amendments proposed by the committee meeting with open and determined hostility from the President and his partisans, who still adhered, with unyielding pertinacity, to his plan of immediate and unconditional admission, it became the rallying-point of the republican party at the late elections, and has thus received the emphatic approval of the people.

But the supporters of the president, comprising the whole democratic party, which, with great unanimity, had gone over to his support, and a comparatively small number of deserters from the Republican ranks, constituted a very large minority, who not only condemned the proposed amendment, but unanimously and

strenuously defended the president, and applauded all that he had done.

Thus it was that the momentous question of executive power became involved in the mazes of party strife; and here I gladly terminate this introductory narrative, which, summary as it is, I fear may prove tedious to the reader.

The Constitution of the United States is obviously, and doubtless was intentionally, modeled after that of our English ancestors. It accordingly distributes the powers of government among three distinct departments. Upon this vital point there does not appear to have been any diversity of opinion in the convention by which it was framed. Everything else elicited controversy and earnest discussion; and

among the numerous grave questions which presented themselves for decision, none was found more perplexing than the organization and powers of the executive department. The lessons of history, collectively, were discouraging; and except by the impressive evidence they afforded of the extreme delicacy and difficulty of the task, and of the necessity of a correspondent degree of circumspection, the light they shed upon the subject was dim. It was finally decided that "the executive power" should be "vested in a President of the United States of America," who should "hold his office during the term of four years." This is declared by the first section of the second article of the constitution, and after prescribing the mode of election, the qualifications as to citizenship, age, and length of residence, requisite to eligibility, and regulating the succession

in case of the removal, death, resignation or inabilty; and the compensation of the president; the section concludes by prescribing the form of an oath or affirmation which he shall be required to take before he enters upon the execution of his office, in the following words: "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

It was decided, also, that the president should "be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." This is declared by the first subdivision of the second section of the same article, which then proceeds specifically to invest the president with certain powers,

and to charge him with certain duties, as follows: "He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

"2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint embassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointment is not otherwise herein provided for, and which shall be established by law. But congress may, by law, vest the appointment of such

inferior officers as they think proper in the president alone, in the courts of law or in the heads of departments.

"3. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session."

The third section contains and concludes this enumeration as follows: "He shall from time to time give to the congress such information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall take care that the laws be faithfully

executed, and shall commission all the officers of the United States."

The fourth section ordains that "the president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for or on conviction of treason, bribery, or other high crimes and misdemeanors."

By the first article, organizing the legislative department, the president is vested with a qualified negative upon all bills, and all orders, resolutions or votes (except on a question of adjournment) requiring the concurrence of the two houses. The nature and limits of this power are too well known, under the name of the *veto* power, to require further definition.

Such is the organization of the executive department of the government as established by the organic law. I trust the reader will discern in the sequel, a suffi-

cient apology for my literal transcription of the whole of this part of it, however familiar to him it may have already been.

And now, what I desire in the first place to bring to his attention, is the discrimination made in terms, and so studiously adhered to throughout, as altogether to exclude the supposition of accident between the Powers and the Duties of the president. I am not, I frankly acknowledge, aware that this distinction has been noticed by any other commentator upon the constitution, whether in writing or in oral debate; but I deem it so important that, at the expense of some repetition, and at the hazard of the imputation of arrogance, I will endeavor, not only to establish the truth of my assertion that it is

distinctly recognized and unequivocally expressed in the constitution, but to demonstrate its propriety. Let us revert, then, to the article in question, as given above. It is unnecessary to observe the order of the rather illogical arrangement of the several clauses, and it will be conducive to perspicuity to begin with the second subdivision of the second section: "He *shall have power*, by and with the advice and consent of the senate, to make treaties, provided," &c.; and then, separated only by a semicolon, follows this clause: "and he *shall* nominate, and by and with the advice and consent of the senate, *shall* appoint," &c. Why this change of phraseology in one and the same sentence? Evidently, because the negotiation of treaties was to be fortuitous and discretionary; while appointments to office were matter of certain and absolute necessity. While, therefore, the language

of the first clause is, so to speak, merely *potential*, that of the second was, unavoidably, *mandatory;* for so it must, of necessity, have been interpreted, even if, like that of the preceding clause, it had, in form, been permissive, for it is only by means of its official organs that a government can be maintained. Let us now attend to the language of the provision for the filling of vacancies. It is the 3d subdivision of the same section. Here we find a repetition of the words employed in conferring the power to make treaties: "The president shall *have power* to fill up all vacancies," &c.

The language is permissive, because it was foreseen that vacancies were likely, from time to time, to occur, which it would be more discreet to leave unfilled until the next session of the senate. The session might be very near at hand; the office might be one of great importance, and might, nev-

ertheless, be temporarily left vacant without serious detriment to the public interests; or, it might arise from the death of a minister in a distant country, to which it would be unwise immediately to dispatch a successor, who might prove unacceptable to the senate. But in addition to the nomination by the president, and the consent of the senate, another act is requisite to render the appointment of officers complete. They could not safely enter upon the execution of their official duties without evidence of their authority, and it was necessary, therefore, to provide for the issuing of commissions; and, this being matter of necessity, the language of command is accordingly again resorted to. The president "*shall* commission all officers of the United States," is the phraseology employed. As with respect to nominations to the senate, so here, it was

not sufficient to *empower* the president to commission his appointees, it was necessary to *require* this of him as a duty, for the fulfillment of which he would be responsible. Again, it is ordained that "the president *may* require the opinion, in writing, of the principal officer," &c.; that "he shall *have power* to grant reprieves and pardons;" and that he *may*, on extraordinary occasions, convene both houses or either of them; and that, in a certain improbable contingency, he "*may* adjourn them." In each of these instances the reason for using the phraseology adopted, is too evident to require elucidation. But then, upon the other hand, it is ordained that the president "*shall*, from time to time, give to congress information of the state of the Union, and *shall* recommend to their consideration such measures as he shall judge necessary and expedient;"

that "he *shall* receive embassadors and other public ministers;" (that is to say, unless he shall, for some special reason, be of opinion that the minister sent ought not to be received at all;) and lastly, "that he *shall* take care that the laws be faithfully executed." The reason, in all these cases, for employing this mandatory form of expression, is no less obvious. These were, in their nature, absolute duties, depending upon no contingencies, and, as to their performance or omission, subject to no discretion.

Assuming, as the result of this analysis, as I hope I may do, that I have established the fact, and shown the propriety of the distinction on which I insist, I have, in the next place, to observe that, with the exception of the military authority conferred upon the president by constituting him

commander-in-chief, not one of the desig nated powers, unless, perhaps, the power of appointment, is *in its nature executive;* and that, with the exception of the power of convening congress, the comparatively unimportant one of requiring the opinions in writing, of the heads of departments, and the veto, all of them might, without inconsistency, have been lodged elsewhere. And hence arises the important question whether the designation of the president as the depository of "the executive power" is to be regarded as, in itself, a source of power.

I have a vague recollection of a dissertation in some form, which I cannot recall, on the powers of the executive, during the administration of president Jackson, in which powers were claimed for him as derivable from this source. But I have wholly forgotten the argument in support of this

claim. And, with this exception, if it be one, I have met with no direct discussion on the subject, except in a speech of Mr. WEBSTER in the senate, to which I design more particularly to refer, in the sequel, in treating of the power of removal. He denied to the president, without qualification, any other powers except those specified in the constitution. His designation as the depositary of the executive power, he insisted, is only equivalent, in import, to the designation of congress as the depository of the legislative power, and confers no power at all. It is abundantly noteworthy also, that, as far as I recollect, these specified powers are the only ones asserted and expounded as belonging to the executive department, by the writers of the *Federalist*, whose well-known object it was to induce the people of the several States to accept the constitution as it came from the hands of its framers,

and, to that end, to make it well understood. On the other hand, in the animated and elaborate discussion which took place in the first congress, in 1789, on the subject of the power of removal from office, to which I shall have occasion also again to advert, it was argued that the power of removal was vested, by implication, in the president, as a part of the executive power; and a majority of the house of representatives, including Mr. Madison, appear to have concurred in that construction. This construction has, moreover, the weighty support of that learned and able jurist, the late Chancellor Kent, in treating of the power of removal in his Commentaries. With this exception, however, both he and the late Mr. Justice Story follow the example of the *Federalist*, in limiting their exposition of the powers of the executive to those specified in the Constitution, as above

enumerated. And in this predicament, as far as I am aware, this great question now stands, and is accordingly open to the freest discussion.

I have already said that the distinction so clearly recognized, and so carefully adhered to, in the Constitution, between the *powers* and *duties* of the president, is left unnoticed by all these writers: but it is hardly necessary to add, that in treating of the powers of the executive, they have by no means limited themselves to those which I have classified as such, to the exclusion of the powers *implied* in the *duties* I have designated under that name. On the contrary, they treat of them indiscriminately, and thus, illogically and erroneously, as I think, confound them. It cannot be reasonably supposed that the primary object of the founders of the government, in specifically and peremptorily enjoining duties

upon the president, was to confer the powers requisite to their performance; nor is it probable that they designed to leave these powers to rest upon the ground of inference alone. If not, then we are to look elsewhere for their source. And where else can it be found except in the declaration at the outset, that the executive power should be vested in the president? The theory that this was, in fact, regarded as the source of his executive authority, serves at once to explain the patent and exact discrimination between powers and duties, and to vindicate its propriety and logical necessity; and, as far as I am able to discern, this is the only explanation it admits of. It serves also, I think, to simplify and facilitate the interpretation of this part of the constitution.

The most comprehensive and important of all the duties enjoined upon the presi-

dent is that of seeing that the laws be faithfully executed. It strictly pertains to the executive department, and constitutes its paramount if not sole distinctive civil function. But is the president to look to this injunction as the source of his authority to perform the duty? Let us see whether it may not more reasonably be deduced from the allotment to him of the executive power. There certainly is nothing in the words of the injunction inconsistent with this interpretation; but, on the contrary, they appear to me to favor it. The president "is to take care that the laws be faithfully executed." I see nothing fanciful in the supposition that this language has reference to the power of appointment, and that it was suggested by the disposition of that power, which, as we have seen, is in effect confided to the president. Seeing that, in exercising his exec-

utive functions, he must of necessity act chiefly through the instrumentality of subordinate officers of his own appointment, it was deemed fit expressly to enjoin it upon him to be careful in the selection of these officers, and to *see* that they were faithful in the discharge of their duties. The oath, couched in imposing language, chosen, doubtless, for the purpose of rendering it the more solemn and impressive, requires a similar interpretation.

In support of this construction, I think I may fairly invoke the authority of the first congress, and of KENT, in virtue of the decision of the former, concurred in by the latter, that the power of removal from office, concerning which, as we have seen, the constitution is silent, being, in its nature, an executive power, is to be considered as one of the powers confided to the president as the depository of the executive power —

the question now being, not as to the extent, but as to the existence of such powers. But if one power be traceable to that source, it must comprehend all kindred powers. The omission of any formal discussion of it by the *Federalist*, and by succeeding commentators, is not inconsistent with the supposition of their belief in it. It is not to be supposed that the subject never occupied their thoughts, and it may reasonably be concluded that if they had been of opinion that the president was possessed of no such powers, they would have denied their existence. But other reasons may be assigned for their silence. The American people, by their acquaintance with the English constitution, and with the organization and operation of the State governments, all of which comprised distinct executive as well as legislative departments, had, before the formation of the constitution, already be-

come familiar with the distinctive nature of executive power. It was not legislative, nor was it judicial. Its function was, not to make or expound the laws, but to execute them.

"The executive," wrote ROGER SHERMAN, from the convention of which he was a member, in answer to a friendly letter from the elder ADAMS objecting to the participation of the senate in the power of appointment to office, "the executive is not to execute its own will, but the will of the legislature declared by the laws."[1]

This was a fundamental principle of the English constitution, as well as of the American constitution. It was by the persistent assumption of powers without warrant of law that CHARLES I. lost his head, and JAMES II. was driven from his

[1] Pitkin's History, vol. 2, p. 289.

throne. "The principal duty of the king," says Sir WILLIAM BLACKSTONE, "is to govern his people according to law." "The king," said BRACTON (who wrote under the reign of HENRY III.), "hath also a superior, namely, God, and also the law;" and in his coronation oath, the King of Great Britain solemnly promises to govern the people of his kingdom "according to the statutes in parliament agreed on, and the laws and customs of the same."

The subordination of the executive to the legislative department of the government, then, is a fundamental and indisputable principle. A systematic and persistent disregard of it by the executive would inevitably lead to intolerable confusion and anarchy, and, if patiently submitted to, must soon end in despotism. What, at any time, the president is bound or permitted to do, in execution of his

executive powers, depends upon the existing laws. To him, not less than to the private citizen, the law is "a rule of conduct prescribed by the supreme power of the state," to which it is his duty to conform. He is not to take it upon himself to supersede the law, or to supply its deficiencies by devices of his own invention, even for the accomplishment of legitimate objects of a nature requiring the agency of the executive; and still more censurable would it be for him to enter upon the pursuit of objects not committed to his charge by the Constitution or the laws. If, in his opinion, existing laws require amendment, or new laws are needed, he is bound to invoke the interposition of the legislature, instead of usurping its powers.

Upon this theory congress have acted ever since the organization of the government. Among the almost innumerable

statutes that, during the seventy-seven intervening years, have been enacted, there are many which, in phraseology, sometimes permissive, and sometimes mandatory, call for executive agency. Sometimes the language is, "the president *may*," or, "it *shall be lawful* for the president;" and sometimes it is, "it *shall be the duty* of the president," or "the president *shall*." These statutes, it will be noticed, also, severally clothe the president with new powers, and impose upon him new duties; and this, of itself, moreover, serves to show how vain, as well as useless, it would have been to attempt any enumeration of the acts which, as the chief executive magistrate, the president has authority, or is required, to perform: and this may reasonably be supposed to be another reason why commentators have abstained from any attempt at the exposition of this undefined mass of executive

power. When the president has done all that the laws require of him, he has done, not only all that he *ought* to do, but all that he *can* do, as the depository of the executive power, without transcending the bounds of his lawful authority. If he does this, though unintentionally, *his orders afford no protection even to the subordinate agent he employs.* It was so adjudged, in an early case, by the unanimous decision of the Supreme Court of the United States. I refer to the case of *Little* v. *Barreme*, reported in 2 Cranch, 170. As it may be briefly stated, and in a manner perfectly intelligible, even to the unprofessional reader, I do not hesitate to describe it.

The case arose under an act of congress, approved March 12, 1799, entitled "An act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof."

By the 5th section of the act it was enacted, "That it shall be lawful for the President of the United States to give instructions to the commanders of public armed ships of the United States, to stop and examine any ship or vessel of the United States on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing *to* any port or place within the territory of the French republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel to seize every such ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the United States." Instructions were accordingly immediately issued by the

secretary of the navy, under the directions of the president, to the commanders of the public armed vessels of the United States, and, among others, to the defendant, Captain Barreme. A part of these instructions were in the following words: "You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, American, and protected by American papers only; but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, bound to *or from* French ports, do not escape you."

It will be observed, therefore, that while the act of congress empowered the president to give instructions to naval com-

manders to seize ships or vessels bound or sailing *to* any French ports, the instructions actually given to Captain Barreme directed the seizure also of vessels bound *from* French ports. Under these instructions he captured and brought into port a vessel bound or sailing *from* a French port; and the question before the court was whether he was answerable in damages to the persons who had been subjected to losses by the capture and detention of the vessel. The Circuit Court of the United States for the district of Massachusetts decided that he *was* so answerable; and an appeal from this decision having been taken to the Supreme Court of the United States, the judgment of the Circuit Court was unanimously affirmed. The opinion of the court was pronounced by Chief-Justice MARSHALL, who, in conclusion, said:

"I confess the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which, indeed, is indispensable to every military system, appeared to me strongly to imply that the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be a proper subject of negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize

an act which, without those instructions, would have been a plain trespass."

This decision was made soon after the organization of the government, and its soundness has never been questioned. On the contrary, the principle on which it is founded has since been repeatedly applied, in this country, as it before had been in England. Its significancy is too obvious to require comment.

The result of this summary view of the executive department, it will be seen, is this: that while, in the distribution of the powers deemed requisite to good government, it was, under various motives of convenience or expediency, and in imitation of the constitution of England, decided to allot to the president certain specified powers which he would not otherwise have possessed, merely as the depositary of the executive power; and to enjoin upon him

some duties which might consistently have been otherwise disposed of; and, for greater safety, some others which properly belonged to the executive department, — the true source of the president's civil executive authority is his designation as its depositary. I am no advocate of the amplification of executive power. On the contrary, I fully participate in the general alarm at the recent assumptions of authority claimed under that name. But I can see no reason to apprehend danger from the construction I have ventured to give to the second article of the constitution. It may, at first view, present itself in a different light to others, a light which may even impart a latitudinarian hue to the executive power; but I am of opinion, on the contrary, that if established and enforced, it would prove a safeguard against the unwarrantable assumption of

authority under that name, by furnishing a definite rule by which to determine its true scope. No one can be insensible to the evident importance of such a rule, nor can it be denied that we are as yet without one. The people of Great Britain, as I have already shown, have such a rule, well settled, well understood, and easily applied; and it is precisely that I propose. The king is invested with certain limited and well-defined prerogatives, which he is at liberty to exercise according to his own will and pleasure, subject only to the constitution, laws and customs of his kingdom. Beyond this, his powers and duties are precisely those I have ascribed to the president as the depositary of the executive power charged with the duty of taking care that the laws be faithfully executed. But in this country the notions universally prevalent concern-

ing both the sources and the scope of executive power are either too vague to admit of definition, or so contradictory as to be wholly irreconcilable. Theories, moreover, have lately, without scruple, been made to conform to the exigencies of party strife; and the president, on account of his line of conduct with respect to the States lately in rebellion, is denounced as an usurper, and applauded as a wise and patriotic statesman.

Let us revert for a moment to the narrative I have given of his pretensions and his acts, and bring them to the test of the principles I have endeavored to establish. He undertook, alone, to bring back the rebel States into the Union, reinvested with all their original rights and privileges as constituent members of it, leaving nothing to congress except what, under the circumstances, was, as he understood it, but

a nominal power, to be exercised by the two houses separately. But the office of the president is to execute the laws "enacted by the Senate and House of Representatives of the United States of America in congress assembled." Had any law been thus enacted directing or empowering Mr. JOHNSON to take upon himself a task so difficult and momentous? So far from it, in consequence of his most reprehensible omission to convene congress, no opportunity had been afforded to it of considering the subject at all. In the prosecution of the work he had thus undertaken, he assumed authority, by proclamation, to appoint and invest with large powers officers unknown to the constitution or laws, under the title of Provisional Governor; and to prescribe, and peremptorily dictate, the steps to be taken by the people of the States with

which he has thus unwarrantably undertaken to deal. To say nothing of his want of authority to act at all, what right had he to act *thus* without legislative sanction? But he is entitled to be heard in his own vindication; and we are not, therefore, to overlook his exposition of the views of executive authority and duty, by which he professed to have been guided, as given in the preamble to his proclamations. The reader is not likely, I think, to have forgotten that he deduces his power and duty to act, not from the 2d article of the constitution, relating, as we have seen, to the executive department of the government, but from the 4th section of the fourth article, which ordains that "THE UNITED STATES shall guarantee to every State in the Union a republican form of government!" Did he suppose himself to be *the United States?* We are not at liberty to

question his sincerity, but a delusion more thorough and complete never swayed the mind of any man since the fall. If the people of a State should see fit to abandon its republican form of government and establish in the place of it one clearly unentitled to that name, congress would be bound to refuse admission to its senators and representatives; and if it should persist in adhering to its new form of government, it would doubtless become the duty of congress to endeavor to devise some scheme for the purpose of restoring the harmony of the Union: and so, if the people of a State should abolish its political organization and thus introduce the reign of anarchy, it would be the duty of congress to interpose and abate the nuisance. But what would the executive have to do in such improbable and "extraordinary" emergencies, except to

aid, in the the manner prescribed by the legislature, in executing its declared will?

A few months after his accession to the presidency, Mr. JOHNSON saw fit to order a quantity of cotton which had belonged to the State of North Carolina, but had been captured by the forces of the Union, in obedience to an act of congress, passed during the first year of the war, to be restored, and the proceeds of other captured cotton of the same State, that had been captured and sold, in pursuance of the same act, to be paid over to the State. And it is stated that he has not scrupled to direct a like disposition of other property to a very large amount, under like circumstances. Whence he supposed himself to have derived his authority to do all this, I am not informed. It seems clear that his power of pardoning offenses against the United States does not warrant it. Pos-

sibly he may have imagined that he possessed it in virtue of his military power, the only other source of authority mentioned in his preambles; and we have seen that his proclamation for the regeneration of North Carolina contained an order to the troops in that department to aid the provisional governor in executing the duties required of him.

Bearing in memory that these and all the other acts I have enumerated, were done in time of peace, let us, then, in the next place, take a summary survey of the powers of the president as commander-in-chief of the army and navy, and see whether they afford any warrant for those acts.

This branch of the executive authority is treated with great brevity by the

Federalist. It is one of the subjects of comment in two of the numbers written by General HAMILTON, one of the least likely of all men to misapprehend it. In number 69, where he refers to it incidentally, he says, "It amounts to nothing more than the supreme command of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the legislature."

In number 74, where the subject is more formally introduced, he devotes to it but a single paragraph, which, as it is short, I shall need no apology for copying: "The President of the United States," he observes, "is to be commander-in-chief of

the army and navy of the United States, and of the militia of the several States, when called into actual service of the United States." The propriety of this provision is so evident, and it is, at the same time, so consonant to the precedents of the state constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares and concerns of government, the direction of war peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the

executive authority. This brevity is imitated by Justice Story and Chancellor Kent in their Commentaries. The main object of all these writers was to show the propriety of having the chief military command committed to the hands of a single person; and that the president, the highest civil magistrate, charged with the duty of maintaining the supremacy of the civil power, was its safest and fittest depository. And it is abundantly worthy of remark, that these three able writers, distinguished for their comprehension and perspicacity, concur in treating the authority of the president derived from the military position assigned to him, as important, or even effective, as far, at least, as the army and navy are concerned, *only in war*. Nor is this at all surprising. The American people have, at all times, been irreconcilably averse to

the maintenance of large standing armies and navies in time of peace. Except a few troops to garrison our widely separated forts, and to protect the frontier settlements against Indian depredations, and the Indians against fraud, encroachment and violence from the natives, in pursuance of laws authorizing the employment of troops for these purposes; and a few ships to guard our coasts and enforce respect for our flag in distant seas, we were to have, and, until now, have had, no army or navy when at peace. The power "to make rules for the government and regulation of the land and naval forces" was expressly confided to congress, who alone had also the power "to declare war," "to raise and support armies," and "provide and maintain a navy." It is true that there are emergencies possible in time of peace, to be effectually met only by the em-

ployment of military force. But they were provided for by the power given to congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" a power exercised by the passage of an act for this purpose in 1792, superseded and repealed by another, passed in 1795, still in force, and fortified by recent amendments. It provides, cautiously and wisely, for each of the contingencies specified in the constitutional grant. The call is to be made by the president. When its purpose is to suppress insurrection against the government of a State, he can act only on the application of its legislature, or, when it cannot be convened, of its executive. When the object is to repel invasion or to suppress resistance to the laws of the United States, by combinations too powerful to be overcome by the civil power, the president is to be gov-

erned by his own discretion. Of the militia so called forth, the president, as we have said, is also the commander-in-chief. They can be kept in the public service only until the expiration of thirty days after the commencement of the next ensuing session of congress. It was in virtue of the first of the above mentioned acts, that General WASHINGTON, in 1794, called forth 15,000 militiamen from New Jersey, Pennsylvania, Maryland and Virginia, for the suppression of a formidable insurrection in the western counties of Pennsylvania, to prevent the execution of the law imposing duties on domestic spirits.[1] What independent powers, then, in time of peace, remain to the presi-

[1] The immediate command of these troops was confided by Washington to the Governor of Virginia. It does not appear that his right thus to delegate his authority as commander-in-chief of the militia in actual service was then doubted; and, though this power was questioned during the war with Great Britain, it seems undeniable, and not likely to be disputed. (2 Pitkin's History, 421.)

dent as commander-in-chief? I leave the reader to answer the question for himself, and to consider whether these powers extend to the political reorganization and restoration to the Union of truant States, or to the squandering of the property of the nation. It is true he may find, in the annals of our brief national existence, a precedent for a virtual assumption by the president of the power to declare war, by means of an order to a military commander to invade the territories of a neighboring nation with whom we are at peace; and another precedent for orders to a commander to pause, notwithstanding the near approach of winter, upon his march, over snowy mountains to a distant region, and to employ his troops in ruthlessly forcing upon the people of a territory, a constitution which they have had no voice in making, and which they abhor;

but he will not fail to discern that these were shameful examples of wanton and wicked usurpation; nor, I trust, will he lack the virtue to blush at their atrocity.

As to the ample powers with which the president is armed as generalissimo, in time of war, they are to be sought for in authentic treatises upon the laws of war. They are altogether exceptional and *sui generis;* they are neither increased nor diminished by their association with the civil powers of the executive. Any attempt, by the framers of the Constitution, to define them, would have been preposterous; and no such attempt was accordingly made. The war-making power was confided to congress, and the president was declared commander-in-chief; and there the subject was, of necessity, left.

I propose now briefly to consider some of those powers and duties of the president which are specifically allotted to him by the Constitution; and, *first*, of THE POWER TO GRANT REPRIEVES AND PARDONS. This power has been supposed to comprehend every species of legal penalty, from the forfeiture of life to the smallest fine; and to extend as well to fines imposed by courts for contempt, including those inflicted on defaulting jurors, as to those imposed by penal laws.[1] It has also been held that it may be exercised before as well as after conviction; and even before indictment, upon an application accompanied by a confession of guilt. It has been supposed, moreover, to warrant, by implication, the commutation of punishment, and the grant of condi-

[1] Opinions of Attorney-General, *passim*.

tional pardons, provided the condition be such that its observance may be enforced, as, for example, enlistment in the navy.[1] No argument can be necessary to prove the high importance of such a power as this, nor to show the weighty responsibility its possession imposes. The inherent difficulty of executing it wisely, and its peculiar liability to pernicious misuse, may be less evident, and certainly have failed to awaken the degree of attention and jealousy they imperatively demand. It would, in reality, be difficult to name a power, to the proper exercise of which a sound and enlightened judgment, honestly and patiently applied, is more indispensable. Consider for a moment its nature. Lord COKE, in treating of "this high prerogative," as he justly calls it, of the king, observes

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[1] Opinions of Attorney-General, *passim*.

that "he is intrusted with it upon especial confidence that he will *spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules,* which the wisdom of man cannot possibly make so perfect as to suit every case." With this assistance from the analytic mind of Lord COKE, I leave the reader to analyze the problem presented for solution, upon an application for pardon; to note its complexity, and to compute the danger of unavoidable error. What, then, is to be expected from the heedless exercise of "this high prerogative?" Unhappily, we are not without experience upon this point. During the presidency of General TAYLOR, a man convicted of coining, systematically prosecuted during many months. upon the clearest evidence, obtained by great exertions on the part of the officers

of justice; who, moreover, was shown, upon his trial, to have incurred the guilt of subornation of perjury, in the hope, by that means, to escape punishment, and who, withal, had, for greater safety, assumed the character of a religious zealot, was unconditionally pardoned without inquiry, within a month after his conviction! I cite this instance from personal knowledge. I cite another from a very cautiously, as well as very ably conducted newspaper. Referring to the annunciation, from time to time, of pardons granted by President JOHNSON, on convictions for forgeries of the national currency, it was stated in the New York Tribune, that these pardons already numbered *more than twenty!* This was several months ago. Whether the practice was thenceforth continued, or whether the severe and well-merited censures of the editor, of an abuse so enormous

and mischievous, served to arrest or check it, I am not informed. These were among the highest and most dangerous crimes known to our laws, crimes which, until lately, in England, subjected the offender to capital punishment. The dullest apprehension can require no prompting to perceive that these presidential acts, instead of being in harmony with the spirit of the laws, were in flagrant conflict, not less with their spirit than their letter. Of the recent prodigal and almost boundless, yet apparently capricious exercise of this power in the grant of pardons for treason, I leave my readers to form their own opinions.

That the power to pardon offenses ought to find a place in our government, few, if any, probably, are disposed to deny.

At the adoption of the Constitution, neither the necessity of the power, nor, *with one exception*, the expediency of vest-

ing it in the president, appears to have been questioned. But it was strenuously insisted that, in relation to the crime of *treason*, "the assent of one or both branches of the legislative body" ought to have been required. General HAMILTON, in the 74th number of the *Federalist*, undertook the task of answering this objection. He candidly admits that there are strong reasons for the exception. "As treason," he observes, "is a crime leveled at the immediate being of society, where the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy toward him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of connivance of the chief magistrate ought not to be entirely excluded." But he had undertaken to defend the Constitution as

it came from the hands of its framers, and he accordingly proceeded, with his wonted ability, to combat the objection. Whether, had he lived to the present day, with faculties unimpaired, the conclusion at which he arrived would have withstood the light of our last six years' experience, may well be doubted.

I PROCEED, in the next place, to consider the President's POWER OF APPOINTMENT TO OFFICE. He is, as we have seen, to nominate, and by and with the advice and consent of the senate, appoint all officers of the United States (with a reservation, however, to congress of power to provide otherwise for the appointment of inferior officers); and, 2, when vacancies "happen" during the recess of the senate, he is

empowered to fill them, by granting commissions to expire at the end of the next session. It will be remembered that in enumerating the powers and duties of the president, I classed the nomination, and, with the approbation of the senate, the appointment of officers among his *duties*, and the filling of vacancies during the recess of the senate among his *powers*, and that I assigned the reason for so doing. But inasmuch as it must be conceded that the duty implies the authority to execute it, and the power implies the duty of its exercise when the public interest requires it, it may be asked, Is not this distinction rather nominal than real? It would, I think, be a sufficient answer to say that having been recognized, and studiously carried out by the founders of the government, we are bound, in analyzing their work, to regard it as one of its

essential elements not to be overlooked. But if I do not greatly err, the distinction is, by no means, devoid of practical importance. On the contrary, I think that inattention to it has contributed in no slight degree to the introduction of the enormous abuses which have grown out of the power of appointment. By habitually contemplating this faculty as a *power granted* to the president, instead of a *stern duty imperatively required*, the American people, from their presidents downward, came at length to regard it in the light of a royal prerogative, which he was at liberty to exercise for his own gratification, with little or no respect to the public welfare. But contemplating it in the light in which it was so carefully placed by our fathers, we are at once freed from a delusion so baseless and pernicious. Looking at it under its true aspect, we discern its true nature.

Its obvious purpose serves to define the limits of the power it implies. We see in it only an obligation imposed on the president by the organic law, to seek out and appoint the most suitable persons to fill the offices therein designated, and to be created by the legislative power; we see and feel that it invests its possessor with no right, in exercising it, to look an inch beyond the public weal; and we instinctively revolt at the thought of its prostitution to personal objects. Such, beyond question, were the views, and the only views, entertained of it by the convention, and by our ancestors in accepting the constitution at their hands. If some vague apprehensions of usurpation or abuse found access to the minds of the more wary, they were dismissed as unworthy suspicions. Among all the great patriots of that day who had been thought of as likely to be called to

fill the presidential office, there was not one of whom such a suspicion could be harbored for a moment; and the present imparted its hue to the future. Nor should we be in haste to impute want of forecast or blind confidence to our progenitors. It required the lapse of more than forty years to demonstrate the error into which they fell. Until after the close of the administration of the younger ADAMS, no president had lacked the virtue to take the Constitution for his guide, and steadfastly to adhere to it; and if honesty can properly be said to be praiseworthy, the conduct, in this respect, of the first six presidents, was the more so on account of the superaddition to their constitutional powers, by legislative construction, of an almost unlimited power of *removal from office*—a subject to which I propose presently to advert. Recurring,

for a moment, to what I have said of the consequences resulting from want of attention to the distinction I have endeavored to establish, I will only add, that the bewildering influence of the false light emanating from this error is clearly traceable in the discussions to which this last-mentioned power has given rise.

But let us now take an observation, and see whither we have drifted during the remaining thirty-seven years of our national existence. In the prosecution of this task I shall have little further occasion to cite the language of the constitution. In narrating the conduct of the successors of Mr. Adams with respect to those parts of it with which we are at present concerned, we shall find them to have been so completely ignored that, in our passage along the rugged path we are to tread, the venerable parchment can

serve no other purpose except, in the end, to mark the fearful extent of our departure from the principles it inculcates and enjoins; and that it might, at the outset, as well have been sorrowfully rolled up and reverently laid aside.

As we have seen, the constitution provides for the filling of vacancies that may *happen* during the recess of the senate. It is silent as to the power of *removal* from office. One of the objections urged against it while pending for ratification by the people of the several States, was the participation of the senate in appointments. The objection was answered in two of the papers of the *Fed-*

eralist. They were written by General HAMILTON, who, as well as Mr. MADISON another of its writers, it is well known, was a member of the constitutional convention. In the seventy-seventh number, assuming the necessity of the existence in the government of a power of removal for notorious incompetency or infidelity, the writer also assumes, without argument or apparent doubt, that "the consent of" the senate "would be necessary to displace as well as to appoint." He doubtless regarded it, as many others have done in the subsequent discussions to which the subject has since given rise, as incident to the power of appointment, and, consequently, as belonging conjointly to the president and senate. And as one of the advantages which might be expected to flow from the coöperation of the senate in the removal as well as in the appoint-

ment of officers, he mentions the greater stability it would impart to the administration of the government. And he observes, that "where a man, in any station, had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt, and bring some degree of discredit upon himself." Such, it may be safely assumed, was the view entertained of the subject in the convention, and by the people; and it is said by Judge STORY to have "had a most material tendency to quiet the just alarms of the overwhelming influence and arbitrary exercise of this prerogative of the executive, which might prove fatal to the independence and freedom of opinion of public officers, as well

as to the public liberties of the country."[1] This interpretation does not appear to have been questioned by any one, except the opponents of the Constitution, by whom the converse was asserted as a reason for rejecting it.[2] But during the first session of congress, in 1789, a bill was brought into the House of Representatives "to establish an Executive Department, to be denominated the Department of Foreign Affairs" (soon afterward changed to the Department of State), which contained a provision "That whenever" the Secretary "shall be removed from office by the President of the United States, or in any other case of vacancy," &c., designating the person who, during such vacancy, should have the charge and custody of the

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[1] 3 Story's Com. on the Const., 390.

[2] 3 Story's Com. on the Const., 393.

records, &c.[1] This indirect ascription to the president, of a constitutional power of removal, met with determined opposition, and led to an elaborate discussion. It was argued by its advocates, that this power "belonged to the president; that it *resulted from the nature of the power*, and the convenience and even necessity of its exercise. It was clearly, in its nature, *a part of the executive power*, and was indispensable for a due execution of the laws, and a regular administration of public affairs."[2] And they expatiated on the evils

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[1] 2 Marshall's Life of Washington, Phila. ed., 160; 1 Statutes at Large, 28. This act was approved July 27; and a few days after, an act to establish the Treasury Department was approved, containing a like provision. Chancellor KENT refers to the latter, as that by which the legislative construction was given. (1 Kent's Com., 310.) Judge STORY'S account is indistinct, and in regard to particulars, unintelligible. (3 Story's Com. on the Const., 393, 394.)

[2] Story's Com. on the Const., 393.

likely to arise from the denial of it to the president.

Repelling the insinuation that they were deluded by the splendor of the virtues which adorned the character of President WASHINGTON, they asserted that their opinion "was founded on *the structure of the office.* The man in whose favor a majority of the people would unite, to elect him to such an office, had every probability, at least, in favor of his principles. He must be presumed to possess integrity, independence, and high talents. It would be impossible that he should abuse the patronage of the government, or his power of removal, to the base purpose of gratifying a party, or of ministering to his own resentments, or of displacing upright and excellent officers for a mere difference of opinion. The public odium which would attach to such conduct would be a perfect secur-

ity against it. And, in truth, removals made from such motives, or with a view to bestow the offices upon dependents or favorites, would be an impeachable offense."[1] And these were patriotic and SAGACIOUS men! If any new evidence were wanting of the impotency of our struggle to raise or rend the veil that shrouds the future from our view, or that, of all sciences, that of government is the most abstruse, may we not, by the light of experience, find it here? Of this house Mr. MADISON was a member; and under his strong sense of the inconveniences which would almost certainly ensue from the want of any power in the government during the recess of the senate, to get rid of an unfaithful or a corrupt officer, he gave his deservedly weighty countenance to the proposed enactment;

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[1] 3 Story's Com. on the Const., 393.

and, after expressing his concurrence in the opinion that no serious danger was to be apprehended of the abuse of the power by the president, he added: "In the first place he will be impeachable by this house before the senate, for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment, and removal from his high trust." The clause affirming the power of removal in the president was retained by a vote of thirty-four members against twenty. In the senate it passed by the casting vote of the vice-president.[1]

This enactment, says Chancellor KENT, "amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as of deci-

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[1] 3 Story's Com. on the Const., 394 (citing 1 Lloyd's Debates, 503); 2 Marshall's Life of Washington, Phila. ed., 160–162.

sive authority in the case. It applies equally to every other officer of government appointed by the president and senate whose term of duration is not specially declared." The Chancellor proceeds to justify it on the ground that this power ought to be regarded as *a part of the executive authority wholly vested in the president*, and in which, therefore, the senate has no right to participate. "The president," he observes, "is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be required to fulfill it." "This question," he adds, "has never been made the subject of judicial discussion; and the construction given to the Constitution in 1789 has continued to rest on this incidental declaratory opinion of congress, and the sense and practice of government since that time.

It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction. It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the president alone the tenure of every executive officer appointed by the president and senate, should depend upon inference merely, and should have been gratuitously declared by the first congress in opposition to the high authority of the *Federalist;* and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of congress even to incorporate a national bank."[1] There is great force in the argument of this distinguished jurist, in sup-

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[1] 1 Kent's Com., 310.

port of the power in question, as, in its nature, appertaining to the executive department, as well as truth in his reflections upon it. They were written in 1825, during the presidency of Mr. Adams. The Constitution had then been in operation thirty-seven years, during which the power had been exercised only for beneficial purposes, unless, as was alleged in a few instances, by Mr. Jefferson. It is not at all surprising, therefore, that he should have admitted its existence and maintained its utility. Had his immortal Commentaries been deferred until after the lapse of only four years, with what reluctance he would have yielded to the force of his own argument, may be partially inferred from a brief note in a subsequent edition. He concurs, it will be observed, in the opinion of the first congress, that the consignment by the con-

stitution of the executive power to the president, is, of itself, a source of power, and that the power of removal is derivable from this source, to which I shall have occasion in the sequel more particularly to refer. Mr. WEBSTER, in his speech in the senate, expressed his dissent from the decision of the congress of 1789; and his conclusion was but a corollary from his denial to the president of all other than the specified powers; for while he was constrained to admit the necessity of a power of removal from office, his theory left him no other source from which it could be inferentially deduced, except the power of appointment; and as this was vested in the president *and senate*, the power of removal could not reside in the president alone, but must belong to him and to the senate conjointly. But, entangled as the question is, with the still unsettled

broader one, whether or not the president derives authority from his designation as the depositary of the executive power, it must be admitted to be involved in no inconsiderable degree of perplexity. Considering the vast importance of the power of removal, it is scarcely conceivable that it was altogether overlooked by the convention, when engaged in regulating the exercise of the cognate power of appointment; and, supposing it to have been thought of, however strange it may seem that it was passed over in silence, we are under the necessity of endeavoring to account for the omission, as the only means of determining to whose hands it was intended to be confided. If we concur with Mr. WEBSTER in his interpretation of the declaration of the constitution, that the executive power should be vested in the president, the conclusion,

as I have already observed, seems almost inevitable, that this delicate and dangerous power was considered to belong to the president and senate conjointly, as an incident of the power of appointment. If, on the other hand, we reject this interpretation, we may then consistently award the power to the president, as one of the constituent elements of the executive power. But this construction would still be open to denial, on the ground, so strenuously insisted on by Mr. Webster, that the power of removal naturally belongs to the power of appointment, and ought, therefore, by implication, in the absence of any constitutional declaration to the contrary, to be held to accompany it. Mr. Webster gave utterance to these opinions in 1835, and he frankly acknowledged that, confident as he then felt of their soundness, he could not venture to assure

the senate that they might not possibly have been biased by the unwarrantable and unforeseen uses to which the power of removal had recently been perverted. What his opinion would have been, had it, like that of the great commentator, been formed during the golden age of the Republic, he has permitted us to conjecture. We had then reached the sixth year of a new, and, on many accounts, memorable era in our national history, commencing with the elevation to the presidency of an unlettered, passionate and vindictive soldier, little, if at all, accustomed to self-control. For my present purpose it is sufficient to say that it was then, for the first time, unblushingly proclaimed that offices were to be regarded as "*spoils*," which "*belonged* to the victor" in the conflicts of party. Had it been designed to limit this dogma in practice to

the filling of vacancies accidentally occurring, and offices newly created by law, its annunciation would, notwithstanding, have been in direct conflict with the obvious and indisputable theory of our government — that offices are trusts created, not for the benefit of those who are to hold them, or of their party, but for the public good; and are accordingly to be conferred only on those who, upon impartial inquiry, appear to be best fitted, by their intelligence and honesty, for the proper discharge of the duties they impose. But the practice, thus restricted, would have been too limited to be productive of serious detriment to the public welfare, and especially as it was not wholly novel, would probably have been submitted to without general complaint. But it was but too evident that no such limits were to be observed. Offices were no longer to

be regarded as agencies created and to be exercised for the benefit of the public, but were to be literally treated as "spoils," to which the title of the victor was to be ruthlessly enforced, not by the legitimate exercise of executive powers, in the manner and for the purposes contemplated by the founders of the government, but by the wanton and absolute perversion of these powers to this new, base and unlawful end. The impatient victors were not to be constrained to wait for vacancies to "happen," and then filled by nomination when the senate was in session, or by appointment when it was not. The tremendous power of removal was no longer to be held in reserve as a safeguard against official dishonesty or incapacity, but was to be audaciously prostituted to the purpose of *creating* vacancies to be filled by the partisans of the president. The process was very simple. No sepa-

rate act of *removal* was required; it was only necessary to *appoint;* the removal was accomplished by operation of law.[1]

No time was lost in carrying out these false principles to their utmost extent. Spies and informers lent their assistance to the work. The old questions—"Is he honest? Is he capable?" were no longer the tests of the propriety of removal, and were scouted as inapplicable to the new system. The inquiry now was, Is he a zealous, devoted and efficient partisan of the president? Many hundreds of faithful and meritorious officers were accordingly displaced during the first year of General

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[1] It was said by Mr. WEBSTER, in his speech in the senate already mentioned, on the subject of the power of removal, that an office is held to be vacated by the mere *nomination* of another person to fill it, although not acted on or rejected by the senate, and I am not aware that the assertion was controverted. It seems strange that this should have been considered other than an inchoate step, in itself ineffectual until concurred in by the senate.

JACKSON'S administration, to make room for successors distinguished for their blind devotion and unscrupulous subserviency to his party. This policy was actively persevered in until the spoils were all distributed; and its spirit was rigidly adhered to in the choice of persons to fill casual vacancies throughout his presidency. Fortunate for the country would it have been had it then been discarded forever. But, unhappily, it was one of those evils which, left to themselves, are sure to be perpetuated, and to increase in vitality as they become more and more inveterate. Such, accordingly, has been the result in this instance. Had General JACKSON, at the outset, been impeached and deposed, as he undeniably deserved to be, for this monstrous abuse of his authority, his election would have proved a boon of incalculable value to his country. That

it has, in fact, proved an ineffable curse, is, unhappily, no less true. It was the first great downward step in our national career. By the tenfold increase to which it has led, of all the pernicious elements of our party conflicts; by the ascendency it has given to motives of personal interest, over the dictates of public duty, in all political discussions and in the selection of candidates for office; by the nefarious means mainly traceable to it, resorted to for the attainment of success in elections, which have thus, at length, come to be regarded as mere scrambles for office; by the terrible inroads it has made upon the manly independence and patriotic aspirations characteristic of our Saxon blood; it has, for thirty-six years, been warring upon that public virtue which constitutes the distinctive and most essential principle of republican governments; and, unless it be

speedily arrested, must end in the overthrow of our own. In corroboration of what I have said I beg leave to refer the reader to a very able and impressive report on "Executive Patronage," made on the 9th of February, 1835, by a committee of the senate; and I shall need no apology for availing myself sparingly of its contents. After pointing out and dwelling upon the large and increasing revenue and expenditures of the government, and showing that the number of public officers holding their places directly or indirectly from the president, and liable to be dismissed at his pleasure, exceeded 60,000, the committee proceed to speak of "the practice so greatly extended, if not for the first time introduced, of removing from office persons well qualified, and who have faithfully performed their duty, in order to fill their places with those who are recom-

mended on the ground that they belong to the party in power;" and they conclude their observations upon this subject as follows: "It is easy to see that the certain, direct and inevitable tendency [of this practice] is to convert the entire body of those in office into corrupt and supple instruments of power, and to raise up a host of hungry, greedy and subservient partisans, ready for every service, however base and corrupt. Were a premium offered for the best means of extending to the utmost the power of patronage; to destroy the love of country, and substitute a spirit of subserviency and man-worship; to encourage vice and discourage virtue; and, in a word, to prepare for the subversion of liberty and the establishment of despotism, no scheme more perfect could be devised." The report concludes in these words: "The disease is daily becoming more aggravated and dan-

gerous, and if it be permitted to progress for a few years longer, with the rapidity with which it has of late advanced, it will soon pass beyond the reach of remedy. This is no party question. Every lover of his country and its institutions, be his party what it may, must see and deplore the rapid growth of patronage, with all its attending evils, and the certain catastrophe which awaits its further progress, if not timely arrested. The question now is, not how, or where, or with whom the danger originated, but how it is to be arrested; not the cause, but the remedy; not how our institutions and liberty have been endangered, but how they are to be restored."

This report gave rise to an animated debate in the senate, and an elaborate speech from Mr. WEBSTER, in which, referring to this abuse, he said: "Sir, we cannot disregard our experience. We cannot

shut our eyes upon what is around and upon us. No candid man can deny that a great, a very great change has taken place within a few years, in the practice of the executive government, which has produced a correspondent change in our political condition. No one can deny that office of every kind is now sought with extraordinary avidity, and that the condition, well understood to be attached to every office, high or low, is indiscriminate support of executive measures, and implicit obedience to executive will."

May it not — borrowing the language of the report of the committee — with truth be said, that if a premium were offered for the best description of the present condition of things, no more perfect one could be devised than that given in this brief extract of the political aspect of the country, as it presented itself to the clear and

penetrating vision of this distinguished statesman, in the sixth year of President JACKSON'S administration? It requires, however, one additional feature to render it complete. General JACKSON removed only those who opposed his election, and appointed only those who belonged to his party. The last of his successors has reversed this rule: he proscribes the party which elevated him to power, and bestows his patronage on those who labored, to the utmost extent of their ability, for his defeat! But while, on the one hand, it must be conceded that, upon a superficial view, this additional feature appears to add ugliness to the portrait, on the other hand, it must be acknowledged that it not only detracts from its force in impelling us onward to destruction, but affords a promise of future good; for while it tends to temper the reckless eagerness of office-seeking politi-

cians, by teaching them that they are liable to be disappointed in their expectations of reward by the tergiversation of their candidate, it adds another incentive to greater caution in the nomination of men to fill the two highest offices in the republic. But the subject is too grave for irony.

What line of conduct, then, with these momentous and alarming truths staring us in the face, does it behoove us to adopt? Shall we ignobly yield ourselves up to the current, and flounder on to the dark and oblivious gulf into which, if we do, it must inevitably and irretrievably plunge us? Or shall we, by one bold and decisive effort, while it is yet in our power, extricate ourselves from this perilous dilemma, and escape a doom so appalling? Surely there ought to be no doubt or hesitation upon a point so vital. But how is the work to be accomplished?

One thing, at least, is clear. No effort, however determined, to turn and patiently stem the current, will suffice. We must get out of it; plant our feet once more firmly upon *terra firma*, and exterminate the stream by exterminating the fountain whence its foul waters are supplied. Here, dismissing the metaphor, I return to the stern realities of the case before us. I have already intimated that the impeachment and deposition of President JACKSON would not only have proved an antidote to the pernicious influence of his example, but an effectual warning to his successors. Why this measure of justice and expediency was not resorted to, it may well be supposed, can hardly fail to become a subject of historic inquiry to posterity; but it is unnecessary now to detain the reader by any explanation. He will at once concur in the statement that such a step was

rendered impossible by the extraordinary circumstances amid which the high offender happened to stand. No such step was accordingly attempted; and the power of impeachment, on which so much reliance was placed by the founders of the government, still remains an untried remedy for executive usurpation and misrule. But the report of the committee of the senate, to which I have referred, was accompanied by a bill, the third section of which was in these words: "That in all nominations made by the president to the senate to fill vacancies occasioned by removal from office, the fact of the removal shall be stated to the senate at the same time that the nomination is made, with a statement of the reasons for such removal."

In the speech of Mr. WEBSTER, to which I have referred, he gave his cordial support to the measures recommended by the

committee, including the section I have copied; and he took occasion to express, at length, his opinions, which he said were the result of long and careful reflection, concerning the powers of appointment and removal. He dissented from the construction given to the Constitution by the first congress, the power of removal being, in his opinion, naturally and necessarily included in that of appointment; and the latter being conferred on the president *and senate*, he thought the power of removal went along with it, and should have been regarded as a part of it, and exercised by the same hands. And while he admitted that the decision of 1789, acquiesced in and recognized by subsequent laws, ought not to be indirectly questioned, he thought that congress might, if necessity should require it, reverse that decision. But however this might be, he was clearly and decidedly of

opinion that congress possessed ample power to regulate the tenure of office. It was a common exercise of legislative power, and it was not, in this particular, at all restrained or limited by anything in the Constitution, except with regard to judicial officers; "all the rest is left to the discretion of the legislature. Congress may give to offices, which it creates, not judicial, what duration it pleases. When the office is created, and is to be filled, the president is to nominate a person to fill it; but, when he comes into office, he comes into it upon the conditions and restrictions which the legislature may have attached to it." Congress might, for example, he said, declare that other offices, besides judicial offices, should be held during good behavior; and if the Constitution had been silent with respect to the tenure of the judicial office, congress might have made it

what it is. And is a reasonable check upon the power of removal anything more than a regulation of the tenure of office?

As to the regulation prescribed in the section above quoted, it was "of the gentlest kind." It only required the president to make known to the senate his reasons for the removals. It might, he thought, very reasonably have gone farther. It might, and perhaps it ought, to have prescribed the form of removal; and it might also, he was of opinion, have declared that the president should only *suspend* officers, at pleasure, only until the next meeting of congress. But he was content with the slightest degree of restraint sufficient "to arrest the totally unnecessary, unreasonable, and dangerous exercise of the power of removal." The degree of regulation proposed by the bill, at least, he deemed necessary; "unless," he added, "we are

willing to submit all these offices to an absolute and perfectly irresponsible removing power; a power which, as recently exercised, tends to turn the whole body of public officers into partisans, dependents, favorites, sycophants and man-worshipers." Being of opinion that the proposed qualification, "mild and gentle" as it was, "would have *some* effect in arresting the evils" against which it was aimed, he therefore gave it his support.

Such an act might now be passed, and would serve the purpose of a palliative. But it would not eradicate the disease, and, with a majority of the senate composed of the partisans of the president, would probably do but little good. The other expedient suggested by Mr. WEBSTER, of passing a new declaratory act asserting the power of removal in the president and senate, is obnoxious to strong objections.

One of the lamentable consequences of the prostitution of this power has been, not only, by familiarity, to reconcile the public mind to its abuse, but to enlist a numerous and powerful army of place-hunters and demagogues to regard it with favor, as their main reliance for success in their vocation. From them, therefore, such a law would probably meet only with clamor and denunciation, as an act of legislative usurpation, while by the public at large it would be regarded with comparative indifference. It must be conceded also that, to reflecting and impartial men, it could not fail to appear to be an experiment of very questionable propriety. The declaratory law would itself, at all times, be subject to repeal, and many years of acquiescence would be required to give it indisputable authority. There are, moreover, serious objections, on the score of

convenience, to the participation of the senate in the exercise of the power of removal; and if it could be effectually guarded against abuse by the president, he would indubitably be its fittest depositary. It may be worthy of consideration, therefore, whether it would not be expedient to endeavor to attain this object by means of a constitutional amendment.

The long continuance of the *usurpation*, upon which I have dwelt at so much length, for such it is, uncountenanced by the letter of the Constitution, and sternly forbidden by its spirit, may seem to palliate the offense; but it affords no justification, and can by no means be held to neutralize its criminality. It is not like the assumption of a questionable power from good motives and for beneficent ends; the incorporation of the Bank of the United States, or the law declaring government paper a

lawful tender, for example, where the acquiescence of the nation may rightly be held a practical sanction and affirmation of the power. Here, to say the least, is a palpable misapplication and wanton abuse of a power, prompted by no justifiable motive, and productive of the most injurious consequences. Nor has it ever received the sanction of the impartial judgment or moral sense of the American people. On the contrary, it has at all times been condemned by enlightened public sentiment. Those who have practiced it have acted with a full knowledge that a day of reckoning might come, and have, therefore, acted at their peril. The first great transgressor—who escaped punishment only because he was more powerful than the law—it is but reasonable to conclude, had but a feeble forecast of the magnitude of the injury he was inflicting

on his country: his successors had the light of experience to guide them, and have incurred the superadded guilt of setting its admonitions at naught.

There are other acts of the present executive on which I have abstained from commenting, not because they would bear the test of the principles I have laid down with respect to the scope of executive power, but because their conflict with those principles is too glaring to require elucidation.

It is not to be denied that the confusion of the public mind concerning the nature and limits of the executive power, civil and military, has been increased by the exhibitions of it during the continuance of the civil war, and, were it not that the president is bound, and is to be presumed, to understand his powers and duties, at all times, the present executive might be held

excusable for having, to some extent, participated in this popular delusion. But it is to be remembered that congress, at its extra session called by President Lincoln immediately after the breaking out of the rebellion, took upon itself the general direction of the war, and exercised it throughout, by enacting laws empowering the president to do whatever they deemed to be necessary to suppress the insurrection, and authorizing the measures to which he, in fact, resorted. An examination of these acts will show that most of them, by their very terms, ceased to be operative as soon as the insurgents laid down their arms; and as these laws afforded no warrant for any acts on the part of the executive which they did not authorize, so, upon the return of peace, they can furnish none for acts which would have been unwarrantable if they had never been enacted. It is

true, also, that in the unprecedented situation in which the country was placed by the sudden outbreak of an insurrection so formidable, the American people ought to have been, as they showed themselves in fact to be, at all times disposed and willing to overlook the occasional errors of judgment, and assumptions of questionable powers, by the conscientious and patriotic man who then occupied the executive chair; but, however difficult and embarrassing the task that, upon the suppression of the insurrection, was undertaken by his successor, he forfeited all claim to forbearance or impunity by unnecessarily and most reprehensibly taking it upon himself without legislative aid and direction.

If an intelligent subject of a despotic government had come among us immediately after his accession to the presidency, ignorant of the organic structure of our

political institutions, would he have been likely, during the recess of congress, to discover, from passing events, that our government was less despotic than his own? And if he had remained here long enough to read the message of the president at the opening of the next session of congress, would he not have sought in it, in vain, for the recognition of any right in congress to exercise an effective control over his will in prosecuting his scheme of construction? These are momentous questions; and if they admit of no other than negative answers, it can require no argument to prove that it is high time for a strenuous effort to restore the government, at once and forever, to its constitutional equilibrium.

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